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Digital Sampling: A Cultural Perspective

Henry Self*

I. INTRODUCTION

Despite a relative absence of guiding case law, much legal commentary on the subject of digital sampling[1] has been published—so much, in fact, that one author recently concluded, "the legality of digital sampling and its implications has been perhaps the student author's favorite dead horse."[2] A wide variety of views on this topic has been presented over the past decade; sampling has been characterized as everything from "a euphemism . . . to mask what is obviously thievery"[3] to "the post-modernist artistic form par excellence."[4] Yet one very important perspective on the topic has remained almost entirely unexamined: the cultural motivations *behind* the now widespread practice of sampling, and the legal implications thereof. This comment seeks to identify some of those motivations by briefly exploring the cultural roots of sampling in New York, Jamaica and Africa. It examines the relative absence of case law addressing the matter and describes the overly cautious industry licensing practices that have resulted. The

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[1] A frequently-cited definition states that digital sampling "is the conversion of analog sound waves into a digital code. The digital code that describes the sampled music or other sound can then be reused, manipulated or combined with other digitized or recorded sounds using a machine with digital data processing capabilities, such as a computer or computerized synthesizer." Judith Greenberg Finell, *How A Musicologist Views Digital Sampling Issues*, N.Y.L.J. p.5 n.3 (May 22, 1992) (citing MAX V. MATTHEWS, THE TECHNOLOGY OF COMPUTER MUSIC II (1969)). A more concise but fairly accurate definition is using "a portion of a previous sound recording in a new recording." Robert G. Sugarman & Joseph P. Salvo, *Sampling Gives Law A New Mix: Whose Rights?*, NAT'L L.J., Nov. 11, 1991, at 21.

[2] Matthew Africa, *The Misuse of Licensing Evidence in Fair Use Analysis: New Technologies, New Markets, and the Courts*, 88 CALIF. L. REV. 1145, n.121 (2000).

[3] Chuck Phillips, *Songwriter Wins Large Settlement in Rap Suit*, L.A. TIMES, Jan. 1 1992, at F1 (quoting counsel for plaintiff in *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*).

[4] David Sanjek, *"Don't Have To DJ No More": Sampling and the "Autonomous" Creator*, 10 CARDOZO ARTS & ENT. L.J. 607, 609, 623 (1992).

comment concludes with a discussion of why sampling is widely perceived as antagonistic to modern Anglo-American copyright law.

II. HISTORY

The conceptual—though not technological—roots of sampling originate primarily in the rich musical tradition of Jamaica.[5] Populated mostly by descendants of West African slaves, Jamaica gained independence from British colonial rule in 1962. Around that time, music was disseminated in Jamaica largely by way of "sound systems": massive sets of amplifiers and speakers that were moved from town to town to entertain dancers at outdoor parties.[6] This was due in part to the severe economic disadvantage suffered by most Jamaicans, who have little disposable income to spend on records or tickets to attend live performances, and also because the elitist state-owned radio stations for a long time shunned the music of the people in favor of American and British pop stars.[7] Records were played by the sound system's "selector," who chose the songs and announced them over his microphone. Sometime around 1956, a few selectors began experimenting with talking over their records, rather than simply between them—incorporating the jive slang of Black Americans with patois, a distinctive West Indian dialect of English. This "chatting" or "toasting" was a hit with audiences and other selectors began to follow suit.[8] Owners of sound systems competed fiercely (sometimes even violently) to garner respect and admiration from fans and soon began to try to gain advantage on the competition by commissioning local musicians to record Jamaican-styled instrumental versions of popular American southern soul songs.[9] These exclusive "versions," pressed to acetate records, allowed the systems' selectors to rhyme over the entire track instead of just the instrumental breaks in a commercial release. A unique new breed of indigenous music soon began to emerge, fusing the vocal stylings of

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[5] Among the many law review articles that have been written about sampling, only one author has actually researched the impact of Jamaican music. *See* Sanjek, *supra* note 4, at 610–11. Others who have mentioned Jamaica have simply restated his research, which focused on dub, a sub-genre of reggae that did not begin to develop until about 1967 and is fairly peripheral to the subject of sampling.

[6] *See* STEPHEN DAVIS & PETER SIMON, REGGAE BLOODLINES: IN SEARCH OF THE MUSIC AND CULTURE OF JAMAICA 13–14 (1977).

[7] *See* BRIAN JAHN & TOM WEBER, REGGAE ISLAND: JAMAICAN MUSIC IN THE DIGITAL AGE 125 (1992) (noting that the advent of privately owned Jamaican stations changed this in the 1980s).

[8] *See* BILL BREWSTER & FRANK BROUGHTON, LAST NIGHT A DJ SAVED MY LIFE: THE HISTORY OF THE DISC JOCKEY 114–16 (1999).

[9] *See* KEVIN O'BRIEN CHANG & WAYNE CHEN, REGGAE ROUTES: THE STORY OF JAMAICAN MUSIC 21–22 (1998).

Jamaican selectors with recycled rhythms ("riddims" in patois) taken mostly from existing hits.

As the popularity of "talkover" spread in the 1960s, a division of labor eventually occurred, with selectors returning to their role as music programmers and vocalists coming to be known as DJs: disc jockeys who "ride the riddim." DJs such as U-Roy, I-Roy and others became Jamaican superstars, achieving native popularity on par with that of international pop musicians. Well-known and widely used riddims also gained legacies of their own. A single instrumental version could appear dozens or even hundreds of times as a backing track to different DJs on different recordings.[10] Veteran DJ Papa San explained to an interviewer in the early 90s:

> In Jamaica right now, we don't really have a copyright law,[11] so anybody can use anybody riddim, and if a guy do a song and it reach number one on a new riddim, everybody is listening to that song and that is the sound that is kicking now, everybody will try to use the same riddim to get their song to kick too.[12]

The selector/DJ/sound system arrangement was an integral component in the development of Jamaican music through the twentieth century, as it evolved from its African roots and native Calypso folk sounds such as mento, to rocksteady and ska in the 1950s and 60s, and on to reggae, a genre that was exported to the world with great success beginning in the 1970s.[13] It is also the primary ancestor of the hugely successful genre of black American music alternately known as rap or hip hop.[14]

The sound system concept was brought to the United States by Clive Campbell, better known as Kool Herc, a Jamaican-born selector whose thunderous Herculoids sound system rocked South Bronx clubs and parties in the early- to mid-70s. Although he originally tried playing reggae records in New York, the genre had not yet gained a signifi-

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[10] *See* DICK HEBDIGE, CUT 'N' MIX: CULTURE, IDENTITY AND CARIBBEAN MUSIC 12 (1987).

[11] In fact, Jamaican law did purport to provide copyright protection during most of the twentieth century with the Imperial Act of 1911, which was later changed in name only to the U.K. Copyright Act. Enforcement was notoriously difficult, however, and penalties were frequently minimal. *See* Susan Amster et al., *Jamaica To Pass New Copyright Act*, 5 No.3 J. PROPRIETARY RTS. 44 (1993). Jamaican authorities modernized the law with the Copyright Act of 1993, which was intended to bring the nation in line with the Berne Convention and the Universal Copyright Convention. *See* Joseph Sofer et al., *Jamaica Adopts New Copyright Law*, 5 No.11 J. PROPRIETARY RTS. 32 (1993).

[12] JAHN & WEBER, *supra* note 7, at 22.

[13] *See* 21 THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 100–01 (2001).

[14] Though there is some dispute over the appropriate distinction between rap and hip hop, the terms are used synonymously in this comment.

cant following in America. So in 1974, Herc began trying to accommodate the break dancers or "b-boys"—young black men who demonstrated intricate solo dance moves during the instrumental breakdowns (known as "breaks" or "breakbeats") of funk records—by adapting the techniques of the Jamaican selectors, which were almost unheard of in the U.S. at the time. He replaced reggae riddims with funk breaks by isolating and playing only the crucial portions of the songs, eschewing the rest of the recording and then fading into the breakbeat of another tune.[15] The dancers loved it and others quickly began imitating Herc's technique. Most notably, Grandmaster Flash and Afrika Bambaataa refined and perfected various methods of turntable manipulation aimed at inspiring maximum crowd response.[16]

Under the leadership of these three black men, rap music as well as an entire hip hop culture developed in the discos, community centers and block parties of the Bronx through the late seventies. Although many hip hop enthusiasts may not realize it, the format on which hip hop is based—with the selector laying down an instrumental backing track over which the vocalist raps—was inherited almost entirely from the Jamaican sound system template. The main differences are nominal: Americans called the selector the "DJ" and the vocalist became known as the master of ceremonies or "MC."[17] And, importantly, the pre-existing breakbeat replaced the riddim as the musical foundation on which the rap is performed.

Sampling technology was well suited to hip hop music, which in its early years relied almost exclusively on the manual dexterity of DJs who maintained a continuous flow of music by "juggling" beats between records on two separate turntables. Hip hop producers began using samplers in the early 80s to recreate in recording studios (with computer-aided precision) what DJs had done all along: isolate, manipulate and combine well-known and obscure portions of others' recordings to produce entirely new and radically altered sonic creations.[18] By the time digital samplers became readily affordable to hip hop producers, the genre had already hit mainstream success in 1979 with the release of the Sugarhill Gang's "Rapper's Delight." This single peaked at number four on *Billboard*'s R&B charts and became the first hip hop release to enter the Top 40, introducing the rest of the nation to the

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[15] *See* BREWSTER & BROUGHTON, supra note 8, at 206–13.

[16] *See id.* at 213–23.

[17] See *id.* at 109, 226–27.

[18] This is not to suggest that the sampler in any way supplanted the DJ, who remains an integral part of hip hop music to this day. According to a cliché among fans and participants, the four main components of hip hop culture are MCing, DJing, graffitti and breakdancing.

New York flavor of rhymes and beats.[19] In the subsequent decades, rap music has become an enormous and lasting musical presence around the world. While the style has evolved significantly and separated into various sub-genres and regional variations, two aspects of hip hop remain constant: the MC/DJ format and the ubiquitous use of samples.

III. Artistic Motivations

Although the technology of digital sampling is relatively new, artistic notions of appropriation as creativity most certainly are not. From musical references to literary allusions to visual puns, the humanities bear innumerable examples of authors building on the foundations of their predecessors.[20] "Nothing today, like nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before."[21]

Against this backdrop of artistic tradition, Marcel Duchamp was among the first to elevate actual appropriation of another's creation to the level of "art" in 1917 with his provocative and controversial *Fountain*, which was truly nothing more than a ceramic urinal that he purchased at a plumbing supply store and signed pseudonymously.[22] Several decades after Duchamp's school of Dadaism, the Pop Art movement emerged in the U.S. Led by such renowned artists as Andy Warhol and Roy Lichtenstein, Pop Art—like digital sampling—focused on utilization and recontextualization of familiar images, messages and objects from the mass media and consumer society. More recently,

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[19] *See* David Toop, Rap Attack: African Rap to Global Hip Hop 78–81 (3d ed. 2000). Although the instrumental portion of "Rapper's Delight" was performed by studio musicians, it is (not coincidentally) based on Chic's "Good Times," which resulted in the Sugarhill Gang being sued for copyright infringement.

[20] "The artist never creates in a vacuum. His or her point of departure is generally an earlier artwork from which the second artist makes a leap of imagination that incorporates the artist's observations to create another work of art. . . . The whole thing is known as the artistic tradition." 2 Ralph E. Lerner & Judith Bresler, Art Law: The Guide for Collectors, Investors, Dealers, and Artists 873 (2d ed. 1998) (offering the example of Manet's *Luncheon on the Grass*, based on a 14th century engraving, which itself was derived from even earlier ancient Roman art).

[21] White v. Samsung Electronics America, Inc., 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting).

[22] Duchamp's most infamous act of appropriation is probably his creation of *L.H.O.O.Q.*—an exact reproduction of Leonardo da Vinci's *Mona Lisa* to which he irreverently added a mustache and goatee. *See* Marcel Duchamp: Respirateur 10 (1995).

postmodernists such as Jeff Koons and Barbara Kruger have earned substantial critical acclaim with their "appropriation art."[23]

British music/pop culture journalist Simon Reynolds declared in 1998:

> This is the *fin de millennium* sampladelic supernova, where the last eighty years of pan-global recorded sound is decontextualized, deracinated, and utterly etherealized. . . . [S]ample based music at its best is fully fledged composition: the creation of new music out of shards of reified sound, an alchemical liberation of the music trapped inside dead commodities.[24]

With *Fountain* and other such "readymades," Duchamp proposed that the act of selection is truly the essence of artistic creation. Maybe, as Reynolds would suggest, the art of sampling is just that; in a society filled with millions more mass media messages than any mortal could ever take in, the skill of filtering—of selecting and re-presenting the most useful or intriguing fragments of others' messages[25]—has perhaps truly become the post-modernist artistic form par excellence.[26]

To some extent, however, evaluating sampling in a scholarly framework of Western artistic movements and ideals fails to recognize it for what it originally was: a folk tradition that emerged from the shared experiences of economically disadvantaged minorities. For this reason, it is important to consider some of the motivations behind sampling that become clear only when viewing sampling through its historical development in Jamaica and the United States:

Reclamation. From Elvis Presley to Eric Clapton to the Beastie Boys, the history of popular music includes a great number of white artists who have attained critical acclaim and worldwide commercial success largely by imitating, repackaging and reselling diluted versions of African-American music such as rock, blues and hip hop to non-black audiences.[27] Likewise, it is now widely recognized that, for the

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[23] Like musicians who engage in sampling, Koons and Kruger have also been sued for copyright infringement. See *Rogers v. Koons*, 960 F.2d 303 (2d Cir. 1991); Steven Vincent, *Loeb and Kruger in Copyright Nightmare*, ART & AUCTION, Oct. 2000, at 26.

[24] SIMON REYNOLDS, GENERATION ECSTASY 45, 47 (1998).

[25] As one music journalist writes: "Being good on the sampler is often a matter of knowing what to sample, what pieces to lift off what records; you learn the trade by listening to music, which makes it an extension more of fandom than musicianship." John Leland, *Singles*, SPIN, Aug. 1988, at 80.

[26] For a discussion of sampling as a postmodern art form, see Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, U.C.L.A. ENT. L. REV. 271, 280–89 (1996).

[27] *See generally* NELSON GEORGE, THE DEATH OF RHYTHM AND BLUES (1988). *See also* K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339 (1999) (exploring how black music artists were routinely deprived of legal protection under the U.S. copyright regime); Neela Kartha, Comment, *Digital*

better part of the twentieth century, many major record labels blatantly exploited black musicians by enticing them into contracts that frequently resulted in their being undercompensated or even not paid at all.[28] By sampling portions of classic (and obscure) jazz and funk recordings, black artists in some ways reclaim a part of their collective African-American identity from the white establishment that appropriated and exploited it years earlier. In this sense, it may be said that some artists are simply reclaiming cultural property that was effectively stolen in the first place.[29]

Integration. When a black producer or DJ utilizes a sample of a white artist, on the other hand, one of her motivations may be to subtly point out to the listener the commonalities that pervade the musical expression of America's diversity of cultures. Theodore Livingstone, also known as Grand Wizard Theodore, the Bronx hip hop DJ widely credited with developing the essential DJ technique of "scratching," recalls listening to Afrika Bambaataa perform in the mid-1970s: "He would play Rolling Stones records, Aerosmith, Dizzy Gillespie. Jazz records, rock records. . . . It didn't matter if you were listening to a white artist or a black artist, it was any record he could find that had a beat on it."[30] Bambaataa explains:

> I used to like to catch the people who'd say, "I don't like rock. I don't like Latin." I'd throw on Mick Jagger – you'd see the blacks and Spanish just throwing down, dancing crazy. I'd say, "I thought you said you didn't like rock." They'd say, "Get out of here." I'd say, "Well, you just danced to the Rolling Stones." "You're kidding!" . . . I'd like to catch people who categorize records.[31]

By demonstrating that white musicians can be funky too, the sampling artist challenges the attitudes of many African-Americans who dismiss white music as irrelevant to their experiences as minorities. In a larger sense, this may be seen as expressing a kind of integrationist message to the various races—a coded way of suggesting that we could all benefit from listening more closely to those who are different from us.

Sampling and Copyright Law in a Social Context: No More Colorblindness!!, 14 U. Miami Ent. & Sports L. Rev. 218, 232–34 (arguing that the compulsory mechanical license of 17 U.S.C. § 115 "made it possible for white artists to shanghai the African-American songbook").

[28] *See id.*

[29] *See* Siva Vaidhyanathan, Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity 137 (2001) (characterizing as a "political act" black rapper Schoolly D's sampling of white rock group Led Zeppelin, which had itself been sued for copyright infringement by black blues musician Willie Dixon).

[30] Brewster & Broughton, *supra* note 8, at 221.

[31] Toop, *supra* note 19, at 65–66.

Contribution. In many ways, the practice of sampling is very much a contemporary demonstration of the folk music tradition.

> Folk music is based on the practice of drawing on existing melodic and textual elements and recombining those elements in ways that create a song that can range from a slightly modified version of an older song to a wholly new piece that contains echoes of familiar melodic or lyrical themes. At the center of this mode of cultural production is intertextuality,[32] in which texts are (re)made from other texts to create a "new" cultural text.[33]

Folk music originates in oral cultures, i.e., societies in which structure, formula, and repetition are used to aid in the transmission of messages—in stories, poems and songs—from generation to generation.[34] As we have seen, the appeal of sampling "is deeply embedded in African American and Afro-Caribbean culture,"[35] which descended from the traditionally oral societies of Africa.[36]

While the most obvious illustration of the continued vitality of the folk tradition in this context may be the vocal improvisations of hip hop MCs and Jamaican DJs[37] (who, for example, frequently "name-check" respected predecessors, lift familiar phrases from popular culture and comment on the contemporary conditions of blacks), it is equally important to recognize that the music itself is also a manifestation of folk ideals. Utilizing a popular riddim or "looped" sample carries on the legacy of the musician who is sampled by creating a new work that incorporates and reinterprets the previous recording. One music journalist argues that "music belongs to the people, and sampling isn't a copycat act but a form of reanimation . . . . Hip-hop is ancestor worship."[38]

As noted earlier, a single version or riddim could be used hundreds and even thousands of times by many different Jamaican artists. Very frequently, these riddims were, at their roots, based heavily on familiar bass lines and phrases from the American southern blues, another musical genre deeply steeped in oral/folk traditions. Over time, certain

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[32] "The theory of intertextuality proposes that any one text is necessarily read in relationship to others and that a range of textual knowledge is brought to bear upon it." JOHN FISKE, TELEVISION CULTURE: POPULAR PLEASURES AND POLITICS 108 (1987).

[33] KEMBREW MCLEOD, OWNING CULTURE: AUTHORSHIP, OWNERSHIP, AND INTELLECTUAL PROPERTY LAW 39 (2001).

[34] *See* WALTER J. ONG, ORALITY AND LITERACY: THE TECHNOLOGIZING OF THE WORD 133 (1982).

[35] *See* VAIDHYANATHAN, *supra* note 29, at 138.

[36] *See* MCLEOD, *supra* note 33, at 71.

[37] *See* CAROLYN COOPER, NOISES IN THE BLOOD: ORALITY, GENDER, AND THE "VULGAR" BODY OF JAMAICAN POPULAR CULTURE 136 (1993) ("The lyrics of the DJs define the furthest extreme of the scribal/oral literary continuum in Jamaica.").

[38] Greg Tate, *Diary of a Bug*, VILLAGE VOICE, Nov. 22, 1988, at 73.

riddims became fixtures in the language of reggae, much akin to American jazz "standards." Likewise, particular drum breaks from recordings by American soul and funk artists (James Brown and George Clinton being primary examples) became essential components of hip hop vocabulary in the 1980s. By adding a vocal performance to a certain riddim, or constructing a rap song around a particular break, the artist uses the sample or riddim as a sort of cultural canvas, onto which he adds his new contribution. In this way, samples permit the contemporary musician to invoke the musical tradition that the earlier artist was speaking to and place the new creation within the larger, shared voice of the musical community.

This approach to performance "represents an important concept common to all African-derived musics."[39] One of the most distinguishing characteristics of African, African-American and Caribbean music, which sets it apart from the European classical tradition, is the fact that the collective voice is generally given precedence over the individual voice of the artist or the composer.[40] As we will see, this difference in approaches to "authorship" has been at the heart of a bitter debate over the legality (and morality) of sampling and may ultimately reveal why the existing American copyright regime has had so much difficulty accommodating (or even understanding) the sampling phenomenon.

IV. Legal Analysis

With four short words, Judge Kevin Thomas Duffy in 1991 sounded a death knell for the sometimes blatant unauthorized sampling that characterized some hip hop music: "Thou shalt not steal."[41] In *Grand Upright Music Ltd. v. Warner Bros. Records*, a decision that many in the music industry had hoped would help begin to clarify some of the uncertain legal implications of sampling, the judge promptly concluded that Biz Markie and his record label infringed the copyright in a Gilbert O'Sullivan composition that the rapper sampled without a license.[42] In a very brief written decision, which equates sampling with theft, the judge concludes that the defendants' "callous disregard for the law and for the rights of others requires not only the preliminary

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[39] Brewster & Broughton, *supra* note 8, at 118.

[40] *See* Hebdige, *supra* note 10, at 11 (1987).

[41] As plaintiff's counsel pointed out, this invocation of the Seventh Commandment was in fact the opinion's only reference to any authority or precedent. *See* Richard Harrington, *The Groove Robbers' Judgment: Order on "Sampling" Songs May Be Rap Landmark*, Wash. Post, Dec. 25, 1991, at D7.

[42] *See* Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182 (S.D.N.Y. 1991).

injunction sought by the plaintiff but also sterner measures," referring the case for possible criminal prosecution.[43]

A good deal of legal commentary has been published criticizing the inadequacy and impropriety of *Grand Upright*[44] as well as examining the potential applications to sampling of such copyright doctrines as fair use[45] and *de minimus non curat lex*,[46] and even proposing a compulsory licensing scheme.[47] To repeat the analyses of these articles would be redundant in this comment, which instead seeks to understand the cultural implications that underlie the hostile attitudes of disdain and contempt demonstrated by Judge Duffy and others who quickly dismiss all sampling as "theft," "pickpocketing"[48] or totally devoid of creativity.[49]

American copyright law was inherited from Great Britain, which initially extended royal protection to book authors in 1710 with the Statute of Anne.[50] In 1787, the framers of the U.S. Constitution authorized Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings"[51] and the first national U.S. copyright law was enacted in 1790, granting exclusive rights to authors of "maps, charts and books."[52] That these early statutes were concerned solely with protecting the creators of printed matter reflects the fact that, by the 18th century, British aristocracy had become a print—as opposed to oral—culture. "Print culture gave birth to the romantic notions of 'originality' and 'creativity,' which set apart an individual work from

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[43] *Id.* at 185.

[44] *See, e.g.*, Carl A. Falstrom, Note, *Though Shalt Not Steal:* Grand Upright Music Ltd. v. Warner Bros. Records, Inc. *and the Future of Digital Sound Sampling in Popular Music*, 45 HASTINGS L.J. 359, 364 (1994).

[45] *See, e.g.*, A. Dean Johnson, *Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits*, 21 FLA. ST. U. L. REV. 135 (1993).

[46] *See, e.g.*, Brett I. Kaplicer, *Rap Music and De Minimus Copying: Applying the Ringgold and Sandoval Approach to Digital Samples*, 18 CARDOZO ARTS & ENT. L. J. 227 (2000).

[47] *See, e.g.*, Michael L. Baroni, *A Pirate's Palette: The Dilemmas of Digital Sound Sampling and a Proposed Compulsory License Solution*, 11 U. MIAMI ENT. & SPORTS L. REV. 65 (1993).

[48] *See* Harrington, *supra* note 41, at D7 (according to plaintiff's attorney in *Grand Upright*, sampling "is a euphemism in the music industry for what anyone else would call pickpocketing.").

[49] *See* Jonathan Takiff, *High Tech and Art*, ST. LOUIS POST DISPATCH, May 5, 1988, at 4F (Sampling "has made it easy for no-talents to steal the creative work and sounds of their betters."). *See also* Steve Hochman, *Judge Raps Practice of "Sampling,"* L.A. TIMES, Dec. 18, 1991, at F1 (Turtles guitarist Mark Volman says "Anybody who can honestly say sampling is some sort of creativity has never done anything creative.").

[50] EDWARD SAMUELS, THE ILLUSTRATED STORY OF COPYRIGHT 12 (2000).

[51] U.S. CONST. art I, § 8, cl. 8.

[52] Act of 31 May 1790, ch. 15, 1 Stat. 124.

other works even more, seeing its origins and meaning as independent of outside influence, at least ideally."[53] Western ideals of intellectual property rights are inextricably tied to fundamental concepts of ownership, exclusion and—most importantly—capitalism.[54] Thus, the concept of plagiarism is "a norm deeply embedded in the Euro-American tradition of print orientation, individual originality, and capitalist commodification of ideas. The conventional view sees a person's words and ideas as private property or commodities to be owned and sold."[55]

This paradigm stands in sharp contrast to the cultural environment of non-Western folk societies, which (as noted above) have tended to value the collective voice of the group over the autonomy of the individual.

> One of the characteristics of Afro-American and Caribbean music often cited by critics in a spirit of censure, is that there is too much stress on repetition and not enough 'originality.' There is a well documented tendency among classically trained, Eurocentric musicologists to write off black music as "repetitive" or "banal."[56]

What Westerners largely fail to understand is that originality was simply not a concern among performers in folk societies, as "there was no framework within which they could even conceive of such a concept."[57] Indeed, no single person could lay claim to a group of words or notes because they belonged to the entire group and descend in various incarnations and iterations through the generations. This "implies that no one has the final say. Everybody has a chance to make a contribution. And no one's version is treated as the Holy Writ."[58]

This attitude is shared to varying degrees by musical artists of today who embrace such an approach to making music. "I don't believe in copyright," says producer Bill Laswell, who has made use of samples in his music for many years, "I think everything should be free. I don't believe in someone owning a group of notes. If someone stole something that I said I'd written—well, I probably didn't write it anyway. I probably subconsciously transferred it from another memory or another time."[59]

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[53] ONG, *supra* note 34, at 133.

[54] *See* Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT'L L. 613, 616–17 (1996).

[55] R.L. Johannesen, *The ethics of plagiarism reconsidered: The oratory of Martin Luther King, Jr.*, 60 SOUTHERN COMMUNICATIONS JOURNAL 185.

[56] *See* HEBDIGE, *supra* note 10, at 15.

[57] MCLEOD, *supra* note 33, at 41.

[58] HEBDIGE, *supra* note 10, at 14.

[59] MODULATIONS: A HISTORY OF ELECTRONIC MUSIC 187 (Peter Shapiro ed., 2000).

V. Music Industry Practice

In the years since *Grand Upright* was decided, no reported judicial decision has seriously and comprehensively tackled the complex legal issues involved in sampling. This may be to some extent because they have not had an opportunity to do so; there has developed in the American music industry, among major labels at least, an atmosphere of utmost caution where sampling is concerned because *Grand Upright* led many to believe that sampling is *per se* infringement of copyrights in both compositions and sound recordings.[60]

> Anecdotal evidence suggests that, rather than face infringement suits, record companies prefer to license the use of any questionable sample prophylactically. Because neither statute nor case law has set any clear standards regarding how much (either qualitatively or quantitatively) is an infringement, users are driven to license even samples that might not infringe or might qualify as fair use under a full analysis. In other words, an industry custom has arisen whereby users pay for licenses even where they do not need them.[61]

Even when artists fail to obtain licenses, nearly all disputes that do result in litigation end up settling before a reported decision can be delivered, frequently due to defendants' fear of unpredictable and potentially large damages awards. The result is a business and legal climate that frequently stifles creativity,[62] possibly unnecessarily. Artists can be prevented by copyright owners and even by their own record labels from engaging in intertextual approaches to making music that could, in fact, be totally legal by virtue of fair use or *de minimis* analyses. However, courts will almost never have any opportunity to resolve these questions because industry practice often prevents artists from using samples in the first place or dictates that labels obtain possibly unnecessary licenses and deduct funds to pay the usually substantial license fees from recording artists' royalties. This illustrates Judge Kozinski's point that "[o]verprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain . . . . Overprotection stifles the very creative forces it's supposed to nurture."[63]

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[60] *See* Africa, *supra* note 2, at 1173–74.

[61] *Id.* at 1174–75.

[62] *See* McLeod, *supra* note 33, at 90–96.

[63] 989 F.2d at 1513 (citing Wendy J. Gordon, *A Property Right in Self Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 Yale L.J. 1533, 1556–57).

VI. CONCLUSION

With his readymade sculptures, Duchamp intended to challenge contemporary assumptions about the nature of artistic creation. "The readymade was controversial because it questioned the value attached to . . . the unique works by individual artists. It raised serious philosophical, aesthetic and social questions."[64] Likewise, digital sampling "disrupts our long-cherished notions of the autonomous creator."[65] As we have seen, the reason that sampling—like the readymade—seems so antagonistic to the unquestioned norms of our copyright system is that it threatens "to undermine the very definitions of 'work,' 'author,' and 'original'—terms on which copyright law rests."[66] The debate over the legality of sampling is ultimately just one manifestation of a broader tension between two very different perspectives on creativity: a print culture that is based on ideals of individual autonomy, commodification and capitalism; and a folk culture that emphasizes integration, reclamation and contribution to an intertextual, intergenerational discourse. The unfortunate result of this tension is that American copyright law, which the Constitutional framers intended "To promote the . . . Arts"[67] is sometimes used to stifle the very creativity that it is supposed to encourage.

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[64] DAWN ADES ET AL., MARCEL DUCHAMP 152–53 (1999).

[65] Sanjek, *supra* note 4, at 623.

[66] *See* VAIDHYANATHAN, *supra* note 29, at 139.

[67] U.S. CONST. art I, § 8, cl. 8. The United States Court of Appeals for the District of Columbia recently rejected an argument that this preambular language is of legal significance. *See* Eldred v. Reno, 239 F.3d 372 (D.C. Cir. 2001), *rehearing and rehearing en banc denied*, Eldred v. Ashcroft, 255 F.3d 849 (D.C. Cir. 2001), *cert. granted*, Eldred v. Ashcroft, 122 S. Ct. 1062 (2002), *order amended*, Eldred v. Ashcroft, 122 S. Ct. 1170 (2002).